Jones v. Barnes, the Sixth, and the Fourteenth Amendments: Whose Appeal Is It, Anyway?

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I. INTRODUCTION

In July 1983 a divided United States Supreme Court in *Jones v. Barnes*[1] held that defense counsel assigned to prosecute an appeal from a criminal conviction does not have, per se, a constitutional duty to raise all nonfrivolous issues requested by the defendant. In the words of the majority, presented in an opinion written by Chief Justice Warren E. Burger, such a rule would "seriously [undermine] the ability of counsel to present the client's case in accord with counsel's professional evaluation."[2] By relying upon considerations of appellate advocacy and the lawyer's professional judgment for the foundation of its opinion, the majority raised several constitutional questions, but left them unaddressed.

This Article will address the following questions: First, is the decision in *Jones v. Barnes* consonant with prior Supreme Court pronouncements on the breadth and function of the sixth amendment right to the assistance of counsel and of the fourteenth amendment guarantees of due process and equal protection? Second, if not, what constitutional duty should be placed upon appointed counsel in order to gain consistency with the principles recognized in those prior decisions?

II. A HISTORY OF THE SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL

The question of the duty of appointed counsel to raise on appeal nonfrivolous issues[3] pressed by the client arose under the broader rubric of the effective assistance of counsel. At some point, failure of counsel to raise meritorious issues on appeal constitutes failure to provide effective counsel.[4] To place into context the issue from *Jones v. Barnes*—the duty of appointed counsel to raise on appeal nonfrivolous issues requested by the client—it is important to trace the development of the right to the assistance of counsel guaranteed by the sixth amendment to the United States Constitution, particularly as it pertains to indigent defendants.

A. *The Right to the Assistance of Counsel as a Fundamental Right*

In 1932 the Supreme Court decided *Powell v. Alabama*,[5] a capital case in which

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1. 463 U.S. 745 (1983).

2. *Id.* at 751.

3. For purposes of this Article, nonfrivolous issues are those legal points arguable on their merits. *See* Anders v. California, 386 U.S. 738, 744 (1967).

4. *See infra* text accompanying notes 37–41; *see also* Fischer & Keeley, *The Duty to Raise Issues Requested by the Client*, Nat'l L.J., Aug. 29, 1983, at 16, col. 1.

5. 287 U.S. 45 (1932).

counsel for the defendants was not appointed until the morning of the trial. The defendants were convicted of rape and sentenced to death.[6] The Court, reversing the convictions, found that the defendants' fourteenth amendment rights of due process had been violated because they had not had sufficient time to work with counsel to prepare a defense.[7]

Though the Court's decision in *Powell v. Alabama* was based upon the due process clause of the fourteenth amendment, rather than upon the sixth amendment right to the assistance of counsel, the case mandated the appointment of counsel for indigent defendants, at least in capital cases, to insure the overall fairness of the trial.[8] That the Court appreciated the position of laypersons in complicated legal matters is evident from this often-quoted language of the opinion:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue and otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.*[9]

Six years later, the Court decided *Johnson v. Zerbst.*[10] In that case, a habeas corpus action, the petitioner was serving a sentence for possessing and uttering counterfeit money. At arraignment before trial, the petitioner pleaded not guilty, stated that he had no lawyer, and, in response to an inquiry by the trial court, said that he was ready for trial.[11] The petitioner was then tried, convicted, and sentenced—without the assistance of counsel.[12] The Court, relying upon the sixth amendment right to assistance of counsel, held that a federal court "could not deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[13] Such waiver must be intelligent and competent, "an intentional relinquishment or abandonment of a known right or privilege."[14]

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6. *Id.* at 49–50.

7. *Id.* at 71. The holding in *Powell v. Alabama* is limited to "capital cases, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like . . . ." *Id.*

8. *Id.*; Levine, *Toward Competent Counsel*, 13 RUTGERS L.J. 227, 229 (1982).

9. 287 U.S. 45, 69 (1932) (emphasis added).

10. 304 U.S. 458 (1938).

11. *Id.* at 460.

12. *Id.*

13. *Id.* at 463.

14. *Id.* at 464. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.*

The Court, since *Johnson v. Zerbst*, has addressed the question of what constitutes an intelligent, competent waiver of the right to counsel. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)) ("he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'"). Discussing whether Faretta himself had waived his right to counsel, the Court noted: "weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record

The historic opinion in *Gideon v. Wainwright*[15] stated that the sixth amendment right to the assistance of counsel is fundamental to a fair trial[16] through the due process clause of the fourteenth amendment. This bound the states to recognize the right of felony defendants to counsel.[17]

In 1972 the right to the appointment of counsel was expanded to reach certain non-felony indigent defendants by *Argersinger v. Hamlin*.[18] The Supreme Court held that no criminal defendants could be deprived of their liberty, even those involved in prosecution for a petty offense, unless they were represented by counsel at trial.[19] The Court stated that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[20] The reasoning of the Court in *Argersinger* reflects the "guiding hand" principle set forth in *Powell v. Alabama*.[21] Recognizing that even misdemeanor or petty offense prosecutions may involve complicated issues that require the attention of trained counsel, the Court noted (with regard to the decision of whether or not to plead guilty), "counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[22]

B. *The Right to the Effective Assistance of Counsel*

1. *At Trial*

The logical corollary[23] to the development of the right to counsel was the development of the right to the *effective* assistance of counsel: "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."[24] Indeed, in *McMann v. Richardson*[25] in 1970, the Supreme Court noted that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."[26] In *McMann*, the defendants were advised by counsel to plead guilty to state felonies. Counsel's advice to the defendants was apparently based upon counsel's belief that confessions given by the defendants would be admissible in evidence at trial, even though the defendants claimed that the

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affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.*

15. 372 U.S. 335 (1963).

16. *See supra* text accompanying note 7.

17. 372 U.S. 335, 343–45 (1963).

18. 407 U.S. 25 (1972).

19. *Id.* at 33. A petty offense is, according to the Court, an offense punishable by imprisonment for less than six months. *Id.*

20. *Id.* at 37.

21. *See supra* text accompanying notes 8–9.

22. 407 U.S. 25, 34 (1972).

23. Levine, *supra* note 8, at 231.

24. Avery v. Alabama, 308 U.S. 444, 446 (1940); *see also* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69–70 (1942); Powell v. Alabama, 287 U.S. 45, 57 (1932).

25. 397 U.S. 759 (1970).

26. *Id.* at 771 n.14.

confessions were coerced.[27] The Court decided that defendants' sixth amendment rights had not been violated because the advice rendered by counsel was "within the range of competence demanded of attorneys in criminal cases."[28] Reiterating the importance of effective counsel in securing the accused's sixth amendment rights, the Court noted that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ."[29]

In 1984 the Court set forth the proper standard for attorney performance in *Strickland v. Washington*.[30] David Leroy Washington pleaded guilty to numerous charges, including three capital murder charges, and was sentenced to death by a Florida trial judge following a sentencing hearing.[31]

Washington sought collateral relief in state court, and later sought a writ of habeas corpus in the federal courts, asserting ineffective assistance of counsel at the sentencing proceeding.[32] Following reversal of Washington's conviction by the United States Court of Appeals for the Fifth Circuit,[33] the United States Supreme Court granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the ineffective assistance of counsel.[34]

Reversing the Court of Appeals, the Supreme Court held that a defendant claiming that counsel's assistance was so ineffective as to require reversal of a conviction must demonstrate two things: that counsel's performance fell below the objective standard of "reasonably effective assistance under all the circumstances;"[35]

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27. *Id.* at 761–64 (1970).

28. *Id.* at 770–71. The United States Court of Appeals relied upon this language to fashion "reasonable competence" and community standards tests for cases involving claims of ineffective assistance of counsel.

Under the "reasonableness" standard, the two predominant tests are whether counsel's actions are those of a "reasonable attorney" or whether counsel's actions meet "community standards." The First, Third, Fourth, Eighth, and Ninth Circuits use the community standards test. *See, e.g.*, United States v. Williams, 631 F.2d 198, 200 (3d Cir. 1980); United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Moore v. United States, 432 F.2d 730, 736–37 (3d Cir. 1970).

The District of Columbia, Fifth, Sixth, and Tenth Circuits follow the reasonably competent attorney standard. *See, e.g.*, Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); United States v. Goodwin, 531 F.2d 347, 348 (6th Cir. 1976); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir.), *cert. denied*, 386 U.S. 877 (1961).

For a discussion of these standards, *see generally* Conflitti, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AMER. CRIM. L. REV. 29 (1983); Levine, *supra* note 8.

29. 397 U.S. 759, 771 (1970).

30. 466 U.S. 668 (1984).

31. *Id.* at 672–75.

32. *Id.* at 675–81.

33. 679 F.2d 23 (5th Cir. 1982).

34. 466 U.S. 668, 684 (1984). It was noted that, with the exception of Cuyler v. Sullivan, 446 U.S. 335 (1980), which involved a claim that counsel's assistance was ineffective because of a conflict of interest, the Court had never directly addressed a claim of "actual" ineffectiveness of counsel's assistance. 466 U.S. 668, 683 (1984).

35. 466 U.S. 668, 688 (1984). The Court recognized that this standard had been adopted by all federal courts of appeals. *See, e.g.*, Trapnell v. United States, 725 F.2d 149, 151–52 (2d Cir. 1983).

The Court instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. 668, 689 (1984).

and that counsel's ineffective assistance prejudiced the defense, that is, that counsel's errors were so serious as to deprive defendant of a fair trial.[36]

2. *On Appeal*

In *Evitts v. Lucey*,[37] the United States Supreme Court held that the due process clause of the fourteenth amendment guarantees a criminal defendant the effective assistance of counsel on the first appeal as of right.[38] Justice Brennan, writing for the majority, noted:

> Respondent's claim arises at the intersection of two lines of cases. In one line, we have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective,' see *Griffin v. Illinois*; among those safeguards is the right to counsel, see *Douglas v. California*. In the second line, we have held that the trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, see *Gideon v. Wainwright*, comprehends the right to the effective assistance of counsel. See *Cuyler v. Sullivan*.[39]

The Court held that these two lines of cases were dispositive of Lucey's claim that there existed a right to effective assistance of counsel on appeal.[40] The Court declined to decide the content of appropriate standards for judging claims of ineffective assistance of counsel, as it was not disputed that the assistance of appellant's counsel was ineffective.[41]

III. The Fourteenth Amendment and Appeals of Criminal Convictions by Indigent Defendants

In *Griffin v. Illinois*,[42] the Supreme Court held that a state was prohibited by notions of due process and equal protection from denying access to appellate review in a manner that discriminated against convicted defendants because of their poverty.[43] Illinois law provided for an appeal as of right in criminal cases, but the defendants in *Griffin v. Illinois* could not afford to purchase the trial transcripts

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36. 466 U.S. 668, 687 (1984). Prejudice to the defense is presumed in certain situations, such as actual or constructive denial of assistance of counsel; state interference with counsel's performance; or conflict of interest on counsel's part. *Id.* at 692.

In the context of the "actual ineffectiveness" claim, the defendant must demonstrate prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

37. 105 S. Ct. 830 (1985).

38. *Id.* at 836. The Court's decision in *Evitts v. Lucey* came a year and a half after *Jones v. Barnes*. Interestingly, the *Evitts* Court's characterization of the basis for its decision in *Jones v. Barnes* was more clear than that given in the opinion itself: "In *Jones*, the appellate attorney had failed to raise every issue requested by the criminal defendant. This Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct in fact served the goal of 'vigorous and effective advocacy.' The Court's reasoning would have been entirely superfluous if there were no right to effective assistance of counsel in the first place." *Id.* at 836 n.8 (citations omitted); *see also infra* text accompanying notes 42–49.

39. 105 S. Ct. 830, 834 (1985) (citations omitted).

40. *Id.* at 836.

41. *Id.* at 833.

42. 351 U.S. 12 (1956).

43. *Id.* at 19.

required for use on appeal of their convictions.[44] The Court stated, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[45]

Seven years later, the Court affirmed this reasoning and expanded the reach of *Griffin v. Illinois* in *Douglas v. California*.[46] In that case, a California intermediate appellate court denied appointment of counsel for purposes of appeal to indigent defendants. Consequently, the appeal was heard without the assistance of counsel, and the defendants' convictions were upheld.[47] In granting the petition for writ of habeas corpus, the Supreme Court held that when the merits of an indigent defendant's first appeal as of right are decided without the assistance of counsel in a state criminal case, there has been a violation of the defendant's fourteenth amendment rights of due process and equal protection.[48] The Court, echoing the reasoning set forth seven years earlier in *Griffin v. Illinois*, stated:

> There is lacking that equality demanded by the 14th Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments in his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[49]

As the United States Supreme Court acknowledged in *Evitts v. Lucey*[50] in 1985, the cases recognizing the right to counsel on a first appeal as of right (*Griffin v. Illinois, Douglas v. California*), and those recognizing that the right to counsel at trial includes a right to effective assistance of counsel, (*Avery v. Alabama, McMann v. Richardson, Strickland v. Washington*), compelled recognition of the principle that the due process and equal protection guarantees extend to indigent defendants the right to the effective assistance of counsel on an equal basis with defendants employing their own counsel at both the trial and appeal as of right.[51] It is under this broad rubric that the question answered by *Jones v. Barnes* arose:[52] Does defense counsel assigned to prosecute an

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44. *Id.* at 13. The Court did not recognize a constitutional right to appeal. "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18.

45. *Id.* at 19.

46. 372 U.S. 353 (1963).

47. *Id.* at 354.

48. *Id.* at 356.

49. *Id.* at 357–58.

50. *See supra* text accompanying notes 37–40.

51. 105 S. Ct. 830, 836 (1985). The principles set forth in the broad language of *Griffin v. Illinois* and *Douglas v. California* have been limited by the Court. In Ross v. Moffitt, 417 U.S. 600 (1974), the Court refused to extend *Douglas v. California* to require counsel for second, discretionary appeals. *See* Herman & Thompson, Scott v. Illinois *and the Right to Counsel: A Decision In Search of A Doctrine?*, 17 AMER. CRIM. L. REV. 71, 109 (1979). The Court in *Ross v. Moffitt* concluded that, at the discretionary appeal stage, the indigent defendant could have meaningful review without counsel. Herman & Thompson, *supra*, at 109. The transcript, the brief prepared by counsel for the first appeal as of right, and the opinion of the first level court of appeals, together with whatever else the *pro se* defendant can add, make meaningful review possible without the presence of counsel. *Id.*

52. *Evitts v. Lucey* was decided January 21, 1985. Thus, that decision was not binding on the Court in *Jones v. Barnes*. The point is that the precedent relied upon by the Court in reaching its decision in *Evitts v. Lucey* was solidly in

appeal from a criminal conviction have a constitutional duty to raise every nonfrivolous issue requested by the defendant?

IV. *Jones v. Barnes*

A. *The Facts*

In 1976 David Barnes was charged with first and second-degree robbery, second-degree assault, and third-degree larceny following the beating and robbing of one Richard Butts in Brooklyn, New York.[53] Butts' testimony and identification of Barnes at trial was the heart of the prosecution's case.[54] On cross-examination, defense counsel asked Butts if he had ever received psychiatric treatment, but did not make an offer of proof on the substance or relevance of the question after the trial judge had instructed Butts not to answer.[55] Barnes was convicted by a jury of first and second-degree robbery and second-degree assault.[56]

The Appellate Division of the Supreme Court of New York, Second Department, assigned Michael Melinger to represent Barnes on appeal.[57] Barnes sent a letter to Melinger which detailed several claims that he felt should be raised on appeal.[58] Barnes included with his letter a copy of the *pro se* brief he had written.[59]

Melinger's letter in response rejected most of these claims, explaining to Barnes that they would not be helpful in winning a new trial or that they could not be raised on appeal because they were not based on evidence in the record.[60] Melinger listed several claims he was considering for inclusion in his brief, and asked for Barnes' "reflections and suggestions" regarding these.[61] The record does not reveal a response by Barnes to this letter.[62]

Melinger's brief to the Appellate Division concentrated on three of the seven claims he had suggested in his letter to Barnes.[63] Melinger also submitted Barnes' *pro*

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place at the time *Jones v. Barnes* was decided in July 1983. As Justice Brennan pointed out, writing for the majority in *Evitts v. Lucey*:

> Moreover, *Jones v. Barnes* adjudicated a similar claim "of ineffective assistance by appellate counsel." In *Jones*, the appellate attorney had failed to raise every issue requested by the criminal defendant. This Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct in fact served the goal of "vigorous and effective advocacy." The Court's reasoning would have been entirely superfluous if there were no right to effective assistance of counsel in the first place.

105 S. Ct. 830, 836 n.8 (1985) (citations omitted).

53. Jones v. Barnes, 463 U.S. 745, 747 (1983).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* These included claims that Butts' identification testimony should have been suppressed; that the trial judge improperly excluded psychiatric evidence; and that Barnes' trial counsel was ineffective. *Id.*

59. *Id.*

60. *Id.* at 747–48.

61. *Id.* at 748.

62. *Id.*

63. *Id.* The points raised were improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper cross-examination of Barnes by the trial judge. *Id.*

se brief, and Barnes later filed two more *pro se* briefs raising three more of the points Melinger had identified in his letter.[64]

At oral argument, Melinger argued the three points raised in his own brief, but not the arguments presented by Barnes in the *pro se* briefs.[65] In May 1978 the Appellate Division affirmed Barnes' conviction.[66]

In August 1978 Barnes filed, *pro se*, a petition for writ of habeas corpus in the United States District Court for the Eastern District of New York, asserting five claims of error, including ineffectiveness of trial counsel.[67] This petition was dismissed by the district court.[68] On appeal, the dismissal was affirmed by the United States Court of Appeals for the Second Circuit.[69] The United States Supreme Court denied certiorari.[70]

In 1980 Barnes tried again. He filed three challenges to his conviction in the New York state court system; all were denied.[71] On March 31, 1980, Barnes filed a petition in the New York Court of Appeals for reconsideration of denial of leave to appeal, claiming for the first time that his appointed *appellate* counsel, Melinger, had provided ineffective assistance.[72]

Barnes then returned to the federal courts, filing in district court a petition for writ of habeas corpus based upon a claim of ineffective assistance of appellate counsel.[73] The district court dismissed Barnes' petition, holding that there appeared in the record no support for a claim of ineffective assistance of appellate counsel. The court stated, "It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach."[74]

The Court of Appeals for the Second Circuit reversed,[75] holding that when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel must argue the additional points to the full extent of his professional ability."[76] In so holding, the Court of Appeals relied upon *Anders v. California*,[77] in which the United States Supreme Court held that an appointed attorney may not withdraw from the representation of a defendant in a nonfrivolous appeal.[78]

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* Ineffectiveness of trial counsel was one of the issues that Barnes had requested that Melinger raise before the Appellate Division. *See supra* note 58 and accompanying text.

68. *Id.*

69. Barnes v. Jones, 607 F.2d 994 (2d Cir. 1979).

70. Barnes v. Jones, 444 U.S. 853 (1979).

71. 463 U.S. 745, 748–49 (1983).

72. New York v. Barnes, 49 N.Y.2d 1001 (1980).

73. 463 U.S. 745, 749 (1983).

74. *Id.* It does not appear, from this language, that the district court accorded much significance to the fact that Barnes had requested (and possibly insisted) that certain issues be raised; indeed, the district court spoke in terms of "every conceivable issue." *Id.*

75. Barnes v. Jones, 665 F.2d 427 (2d Cir. 1981).

76. *Id.* at 433.

77. 386 U.S. 738 (1967).

78. *Id.* at 744.

The issue in *Anders v. California* was the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after the attorney has determined there is no merit to the indigent's appeal.[79] Anders sought appeal from a felony conviction, and requested appointment of counsel. Appointed counsel, after studying the record and consulting with Anders, concluded that there was no merit to the appeal and so advised the California District Court of Appeals.[80] Anders requested that another attorney be appointed to prosecute the appeal; when the request was denied, petitioner proceeded *pro se*. The conviction was unanimously affirmed.[81]

Petitioner filed an application for writ of habeas corpus in the District Court of Appeals, asserting that the court's refusal to appoint counsel was a deprivation of his right to counsel.[82] Upon denial of the application, petitioner filed for writ of habeas corpus with the Supreme Court of California, which petition was denied.[83]

The United States Supreme Court reversed the judgment, finding that California's action did not "comport with fair procedure, and lack[ed] that equality that is required by the Fourteenth Amendment."[84] Acknowledging its continuing adherence to the equal protection principles set forth in *Griffin v. Illinois*[85] ("where it was held that equal justice was not afforded an indigent appellant where the nature of the review 'depends on the amount of money he has'"[86]), and to the sixth amendment principles set forth in *Gideon v. Wainwright*[87] ("in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"[88]), the Court decided that appointed counsel's bare "no-merit" conclusion did not afford Anders his right to full appellate review.[89]

In order to satisfy constitutional requirements, the Court held, if counsel conscientiously decides that the appeal is wholly frivolous, he should advise the court and request permission to withdraw.[90] Counsel must furnish the court and the indigent with a brief setting forth anything in the record that might arguably support the appeal. If after full review the court finds any legal points arguable, it must afford the indigent the assistance of counsel to argue the appeal.[91]

This procedure, said the Court, echoing *Griffin v. Illinois*, "will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who

79. *Id.* at 739.
80. *Id.*
81. *Id.* at 740.
82. *Id.*
83. *Id.* at 741.
84. *Id.*
85. *See supra* text accompanying notes 42–46.
86. 386 U.S. 738, 741 (1967).
87. *See supra* text accompanying notes 15–17.
88. 386 U.S. 738, 742 (1967).
89. *Id.* at 744.
90. *Id.*
91. *Id.*

are able to afford the retention of private counsel."[92]

The Court of Appeals in *Barnes v. Jones* reasoned that if *Anders v. California* prohibited counsel from withdrawing from a nonfrivolous appeal, it also prohibited counsel from withdrawing from raising a nonfrivolous *issue* on appeal:

> [A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right to equal access to the appellate process . . . .[93]

B. *The Majority Opinion*

The United States Supreme Court was thus faced with this question: Does defense counsel assigned to prosecute an appeal from a criminal conviction have a constitutional duty to raise every nonfrivolous issue requested by the defendant, his client? The majority answered this question in the negative.[94]

Chief Justice Burger acknowledged, in the beginning of a brief opinion, that an accused defendant has the ultimate authority to make certain fundamental decisions regarding the case (for example, whether to plead guilty, waive a jury, or to testify in his or her own behalf),[95] and that a defendant may, as a general matter, act as an advocate on his or her own behalf.[96] However, the majority held that indigent defendants do not have a right to compel appointed counsel to raise nonfrivolous issues requested by them "if counsel, as a matter of professional judgment, decides not to present these points."[97]

The crux of the majority opinion is the superior ability of counsel to make a professional judgment regarding the conduct of an effective appeal. The Court discussed the most effective tack for presenting an argument to an appellate court: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."[98] The Court apparently concluded that the appointed lawyers best meet their obligations to their clients by bringing to bear all their knowledge, skill, and experience to win reversal of a conviction. Indeed, the Court concluded that Barnes' counsel, Melinger, by using his professional judgment to select the issues he deemed to be the strongest for appeal, supported his client's appeal "to the best of his ability."[99]

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92. *Id.* at 745.

93. 665 F.2d 427, 433 (2d Cir. 1981).

94. 463 U.S. 745, 754 (1983).

95. *Id.* at 751 (citing Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)).

96. 463 U.S. 745, 751 (1983) (citing Faretta v. California, 422 U.S. 806 (1975)).

97. 463 U.S. 745, 751 (1983).

98. *Id.* at 751–52. The Court discussed several articles and treatises advancing the art of appellate advocacy. *See* R. STERN, APPELLATE PRACTICE IN THE UNITED STATES (1981); Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940); Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMPLE L.Q. 115 (1951); *see generally* Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976).

99. 463 U.S. 745, 754 (1983) (quoting Anders v. California, 386 U.S. 738, 744 (1967)).

V. *Jones v. Barnes*: An Analysis

The reasoning of the majority in *Jones v. Barnes* is persuasive. The right to the assistance of counsel is itself a recognition of the fact that those trained and experienced in the practice of law are best qualified to secure the rights guaranteed to individuals by the Constitution and the laws—their guidance is necessary to achieve the correct or desired result. In recognizing that the fourteenth amendment due process and equal protection clauses mandate the appointment of counsel for indigent criminal defendants,[100] the Court acknowledged that those unable to pay for it are entitled, as a matter of law, to the benefits of the professional ability of counsel on par with those defendants able to employ counsel.

If it is recognized that as a general matter criminal defendants are unable to present their own defenses as effectively as trained counsel, and thus that defendants must be entitled to the assistance of counsel in preparing their defenses, it follows logically that counsel, because of superior ability, should decide what issues should be presented on appeal. Stated more specifically, if by requiring the appointment of counsel for indigent defendants[101] one intends to protect them from their own lack of legal expertise, it would then not be sensible to allow them to decide, against the advice of counsel, which issues should be raised on appeal. Since it is important to provide indigent defendants with the best possible representation, appointed counsel should not be placed under the restrictions of an appellate strategy dictated by the untrained, legally inexperienced defendant.

This is, in effect, the implicit mainstem of the majority's opinion in *Jones v. Barnes*. Such an argument, that an indigent defendant is more likely to be given the best representation by allowing appointed counsel to decide which issues to press, has both strength and appeal. In the words of the majority,

> [T]he role of the advocate "requires that he support his client's appeal to the best of his ability." Here the appointed counsel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy.[102]

However logically and practically appealing the majority's reasoning may be, the Court's reliance upon considerations of appellate advocacy and strategy to answer a question with obvious constitutional ramifications is unsettling. The opinion fails to address the equal protection and due process questions inherent in the issue before the Court.

A. *Equal Protection*

The Supreme Court in *Griffin v. Illinois*[103] and *Douglas v. California*[104] held

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100. *See supra* text accompanying note 8.

101. This notion includes the caveat that the defendant may, knowingly and intelligently, waive appointment of counsel. *See supra* text accompanying notes 10–14.

102. 463 U.S. 745, 754 (1983) (quoting Anders v. California, 386 U.S. 738, 744 (1967) (citation omitted)).

103. 351 U.S. 12 (1956).

104. 372 U.S. 353 (1963).

that states cannot discriminate against indigent defendants in giving access to appellate review: "[T]here can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'"[105] In *Jones v. Barnes*, the Court compelled an indigent defendant to accept the professional judgment of counsel concerning which nonfrivolous issues to raise on appeal. A "paying" accused is under no such compulsion. The "paying" accused has, theoretically, the financial power to direct his or her attorney to conduct the appeal according to the defendants' wishes.[106] Denying the indigent defendant similar control is not consistent with the constitutional principles set forth in *Griffin v. Illinois* and *Douglas v. California*.[107] Clearly the import of these decisions is that such differential treatment of indigent defendants vis-à-vis defendants employing their counsel is not constitutionally permissible. The Court in *Jones v. Barnes*, by completely avoiding the equal protection issue, does more than simply raise questions about the scope and meaning of its decisions in *Griffin v. Illinois* and *Douglas v. California*. Indeed, the result in *Jones v. Barnes*, leaving the indigent defendant (unlike the "paying" accused), without the right to direct counsel to raise issues on appeal, flies in the face of the principle set forth in *Griffin v. Illinois* and echoed in *Douglas v. California*: "[T]here can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'"[108]

B. *Fundamental Decisions versus Matters of Strategy*

As stated earlier, in 1977 the Supreme Court in *Wainwright v. Sykes* noted that criminal defendants have the ultimate authority to make certain fundamental decisions regarding their cases.[109] In previous cases, these have been identified as whether to plead guilty,[110] whether to waive a jury,[111] whether to testify in one's own behalf,[112] and whether to take an appeal.[113] Other decisions, generally classified as matters of "trial strategy," are said to be the sole province of counsel.[114]

Without discussion, the Court in *Jones v. Barnes* apparently decided that the question of which nonfrivolous issues to raise on appeal is purely a matter of appellate strategy. This proposition is at least debatable, particularly in view of the reasons asserted for allocating to counsel decisions of strategy. As stated in *Wainwright v. Sykes*:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client . . . has responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. . . . The trial process simply

105. *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).
106. Whether or not the defendant uses this power should not, for constitutional purposes, concern us here.
107. *See supra* text accompanying notes 103–05.
108. Douglas v. California, 372 U.S. 353, 355 (1963) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).
109. *See supra* text accompanying note 95.
110. Brookhart v. Janis, 384 U.S. 1, 7–8 (1966).
111. Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).
112. *Id.*
113. Fay v. Noia, 372 U.S. 391, 439–40 (1963).
114. Faretta v. California, 422 U.S. 806, 820 (1975); Henry v. Mississippi, 379 U.S. 433, 451 (1965).

> does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.[115]

It makes sense, obviously, to relegate decisions of this kind to counsel. These decisions clearly are matters of pure strategy, decisions which must often be made in a matter of minutes or seconds in the course of a trial.[116] The decision of which nonfrivolous issue to raise on appeal is, however, a different kind of decision. Its relegation to counsel is not supported by the considerations set forth above.

First, the decision of which issues to press on appeal is a decision which can be, and should be, made with deliberation, in the course of deciding whether to appeal at all.[117] Second, by its very nature, it is the kind of decision that the defendant should be involved in, since it concerns the very substance of the appeal. Surely this is a decision fundamental to the case, in the same way that the decisions whether to appeal, plead guilty, or waive a jury have been deemed fundamental.[118]

C. *Practical Considerations*

In addition to the constitutional issues set forth in the above sections, there are practical, nonconstitutional considerations left unaddressed by the majority in *Jones v. Barnes*. First, the Court seems to assume that a well-counseled defendant, appealing a criminal conviction (and presumably trying to avoid imprisonment or a fine), would reject counsel's advice as to the most effective means of pursuing the appeal, and insist, over counsel's objections, on having the case presented according to the defendant's wishes.[119] Common sense dictates that the larger number of defendants would heed counsel's advice (if they ever challenged it to begin with), and prosecution of the appeal would proceed according to counsel's professional evaluation. As Justice Brennan stated in dissent:

> It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise, and other policies should be weighed in the balance as well.[120]

Second, for that small group of well-counseled clients that chooses to disregard counsel's advice and contrarily insists upon the presentation of other issues, the forcing upon them of counsel's judgment can only serve to intensify an already existing distrust of the criminal justice system.[121] If the client is prevented from

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115. 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (footnotes omitted).

116. 463 U.S. 745, 760 (1983) (Brennan, J., dissenting).

117. *Id.*

118. *See supra* text accompanying notes 110–14.

119. The Court noted its assumption that the Court of Appeals majority correctly concluded that David Barnes *insisted* that counsel raise the issues he requested, and did not simply accept counsel's decision not to press those issues. 463 U.S. 745, 750 n.4 (1983).

120. 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).

121. *Id.* at 762. *See also* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973); *see*

adding meaningful input into the conduct of the appeal, it is unlikely that the client will believe that counsel, chosen and paid by the very same prosecuting government, is acting in the client's best interests. As the Supreme Court noted in *Faretta v. California*,[122] with regard to the right of accused defendants to represent themselves at trial: "To force a lawyer on a defendant can only lead him to believe that the law contrives against him."[123]

D. *Whose Appeal Is It, Anyway?*

The most disturbing aspect of the opinion in *Jones v. Barnes* is the majority's reliance upon considerations of effective appellate advocacy, rather than upon constitutional considerations, as the basis for its decision. Is the appeal merely a forum for counsel to exhibit skill at selecting meritorious arguments and in building an effective and artful case? Or is the appeal a forum for defendants to present their cases with the aid of one trained in law and procedure—to give defendants their "day in court"? These questions give rise to both constitutional and policy issues.

The sixth amendment guarantees that in criminal prosecutions, those accused shall have the right to the *assistance* of counsel for their defense.[124] As Justice Brennan noted in dissent in *Jones v. Barnes*,

> [t]he import of words like "assistance" and "counsel" seems inconsistent with a regime under which counsel appointed by the state to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed him to raise them.[125]

Though the majority in *Jones v. Barnes* does not explicitly define "assistance of counsel," it is clear that its interpretation does not place emphasis upon the word "assistance." Under the view of the majority, it appears that to the indigent defendant, the guarantee of the right to the assistance of counsel becomes an all-or-nothing proposition; if the indigent defendant chooses to be represented by counsel for purposes of pursuing an appeal, all control over the substance of that appeal is relinquished to counsel. Such a result is completely inconsistent with the language used by the Court in *Faretta v. California*[126] and *McKaskle v. Wiggins*.[127]

The issue in *Faretta v. California* was whether the defendant in a state criminal case had a sixth amendment right to proceed at trial without the assistance of counsel, when he voluntarily and intelligently elected to do so.[128] In holding that the defendant

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generally Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); Skolnick, *Social Control and the Adversary System*, 11 J. CONFLICT RES. 52 (1967).

122. 422 U.S. 806 (1975).

123. *Id.* at 834.

124. U.S. CONST. amend. VI.

125. 463 U.S. 745, 755–56 (1983) (Brennan, J., dissenting).

126. 422 U.S. 806 (1975).

127. 465 U.S. 168 (1984).

128. 422 U.S. 806, 807 (1975). The Court in *Faretta* also stated the issue this way: "Whether a state may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.*

could waive his right to the assistance of counsel under the sixth amendment, the Court stated:

> It [the counsel provision] speaks of the "assistance" of counsel, and *an assistant, however expert, is still an assistant.* The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, *shall be an aid to a willing defendant*—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.[129]

The import of this language, written only eight years before *Jones v. Barnes* was decided, is to recognize the role of counsel as an aid to the defendant, an "assistant" in the ordinary sense of the word.[130] It would appear that the role of an assistant, an aid to the defendant, is inconsistent with the view of the majority, which seems to allow counsel, despite his client's wishes, to dictate the conduct of the appeal.

The result in *Jones v. Barnes* is also inconsistent with language in *McKaskle v. Wiggins*, a case which, like *Jones v. Barnes*, concerned the limits placed upon the role of appointed counsel. In *McKaskle v. Wiggins*, the defendant in a state robbery trial was permitted to appear *pro se*, but the trial court appointed standby counsel to assist him.[131] Throughout the trial, the defendant changed his mind regarding the standby counsel's role, agreeing to counsel's participation on some occasions, and rejecting it on others.[132] Following his conviction, the defendant appealed on the ground that his standby counsel interfered with his presentation of his defense.[133] After exhausting state review, the defendant filed a habeas corpus petition in federal court, claiming that standby counsel's conduct deprived him of his right to present his own defense, as guaranteed by *Faretta v. California*.[134] Finding that defendant's rights had not been violated, the Court discussed the role of counsel: "The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defense,' implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial."[135] The language used by the Court in these decisions clearly contemplates that the role of appointed counsel is to aid the defendant in making decisions that are the defendant's to make, not to make decisions for the defendant.

The majority view is most unsettling because of the underlying thread running through the Court's opinion. The opinion seems to define the sixth amendment issues in terms of the duties of appointed counsel, rather than in terms of the rights of the defendant. While it may be suggested that counsel's duties and defendant's rights are simply two sides of the same coin—that each defines the scope of the other—it is clear that the sixth amendment, which speaks in terms of the "accused," contemplates that the rights of the defendant be the yardstick by which the duties of counsel

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129. *Id.* at 820 (emphasis added).

130. Assistant is defined as "one giving aid or support . . . one who assists: HELPER." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 132 (1981).

131. 465 U.S. 168, 170–71 (1984).

132. *Id.* at 172–73.

133. *Id.* at 173.

134. *Id.*

135. *Id.* at 174.

are measured. As the Court stated in *Faretta v. California*, "[t]he right to defend is given *directly to the accused*; for it is he who suffers the consequences if the defense fails."[136] Defining the counsel's duties without delineating the scope of the defendant's personal rights results in a "different conception of the defense lawyer's role—he need do nothing beyond what the State, not his client, considers most important."[137]

This is the crux of the issue. If the sixth amendment right to defend *is* given directly to the accused, it is consistent with that right to say that the accused, not counsel, has the ultimate authority to decide which nonfrivolous issues should be raised on appeal. In dissent, Justice Brennan stated his belief that "the right to 'the assistance of counsel' carries with it a right, *personal to the defendant*, to make that decision, against the advice of counsel if he chooses."[138]

Surely, *Faretta v. California*, *Anders v. California*,[139] *Griffin v. Illinois*,[140] and the "guiding hand" language of the Court in *Powell v. Alabama*[141] describe the right to the assistance of counsel in terms similar to those used by Justice Brennan and quoted above.[142] These cases indicate that the Supreme Court has long considered the sixth amendment right to the assistance of counsel an individual right, personal to the defendant and that the "function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him . . . ."[143]

The majority seems to assert that on the basis of what is known about effective appellate advocacy, an indigent defendant is provided with better representation if appointed counsel is allowed to bring to bear the full weight of his or her professional judgment in selecting which nonfrivolous issues to present on appeal, regardless of the defendant's wishes in the matter. Such a view is merely a smokescreen for denying indigent defendants the full extent of their fourteenth amendment and sixth amendment rights as described by the Court in *Faretta v. California*.[144] Certainly, full representation for indigent defendants is a goal under the sixth and fourteenth amendments, but the *full* effectuation of the defendant's rights—even if the defendant should lose the appeal—is the greater good at stake.

"[A]lthough the accused may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[145] If the lifeblood of our law, embodied by the

136. 422 U.S. 806, 819–20 (1975) (emphasis added).

137. 463 U.S. 745, 764 (1983) (Brennan, J., dissenting).

138. *Id.* at 758 (emphasis added).

139. 386 U.S. 738 (1967). To satisfy the Constitution, counsel must function as an advocate for the defendant as opposed to a friend of the court. *Id.* at 744.

140. *See supra* text accompanying notes 42–45, 105.

141. 287 U.S. 45, 69 (1932). *See supra* text accompanying note 9.

142. *See supra* text accompanying note 125.

143. 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) (emphasis in original).

144. *See supra* text accompanying notes 128–29, 136–37.

145. Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

Constitution, is respect for the dignity of the individual,[146] then surely the right of defendants to choose the issues by which they bring an appeal, with advice of counsel, should be acknowledged. It is this right of the defendant which must prevail over accepted tenets of effective appellate advocacy, even if the latter is viewed from a practical perspective as being for the defendant's "own good." This issue serves to remind, as much as any other, of our "legitimate interest in justice for its own sake."[147]

The Supreme Court of the United States has, in *Jones v. Barnes*, avoided answering constitutional questions inherent in this case. To decide an issue apparently fraught with constitutional considerations on the basis of treatises (however scholarly) advancing the art of appellate advocacy serves no one. Perhaps underlying the decision are notions that indigent defendants, having received a "free" lawyer, should be well-satisfied with the fact of appointment and should not interfere with counsel's conduct of the appeal. Possibly, the Court was concerned with the effect the Brennan view would have on the already overcrowded and slow-moving appellate docket. Finally, perhaps the Court was considering the notion that most of the convicted defendants, having once been proven guilty, have already had their day in court. The above potential justifications for the majority's opinion are at best speculations, for none of them were expressly addressed by the Court. One thing, however, is certain: The constitutional issues avoided by the Court in *Jones v. Barnes* must ultimately be addressed in the future.

VI. A Proposal

Following the equal protection and sixth amendment principles set forth by the Court in *Griffin v. Illinois*, *Douglas v. California*, and *Faretta v. California*,[148] it seems clear that the right of the indigent defendant to exercise ultimate authority in deciding which nonfrivolous issues to present on appeal exists and should be recognized by the Supreme Court.

The corresponding duty of appointed counsel, suggested by Justice Brennan in dissent,[149] is to assess the merits of the nonfrivolous issues available for appeal and present these to the defendant with advice as to the most effective tack, according to counsel's professional opinion, to pursue on appeal. After having heard counsel's professional evaluation and advice, if the client insists[150] that counsel raise issues other than, or in addition to, those recommended by counsel, the attorney should be constitutionally compelled to do so.[151]

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146. This proposition is supported, with regard to the sixth amendment, by the decisions in *Faretta v. California*, *Anders v. California*, *Griffin v. Illinois*, and *Powell v. Alabama*. *See supra* text accompanying notes 139–43.

147. Bazelon, *supra* note 121, at 5.

148. *See supra* text accompanying notes 103–47.

149. 463 U.S. 745, 754 (1983) (Brennan, J., dissenting).

150. Clients should be informed of their right to make the ultimate decision regarding the issues to be raised on appeal, if they wish to do so. If the client merely suggests other issues to be raised, or questions the judgment of counsel, this could lead to a discussion between counsel and client; an opportunity for counsel to persuade the client to accept the suggested course of action. If the client *insists*, however, counsel is under a duty to follow the client's direction.

151. Of course, counsel is under no duty to raise those issues which are frivolous (without merit). *See supra* note 3.

This approach is required by the equal protection principles recognized in *Griffin v. Illinois* and *Douglas v. California*.[152] If "there can be no equal justice where the kind of appeal a man enjoys 'depends upon the amount of money he has,'"[153] indigent defendants are constitutionally entitled to the power to compel their appointed attorneys to raise issues on appeal—a power that "paying" defendants, at least in theory, have.

Recognition of this duty is also consistent with the sixth amendment considerations set forth by the Court in *Faretta v. California* and *McKaskle v. Wiggins*,[154] which contemplate that the role of appointed counsel is to *aid* defendants in making decisions that are theirs to make. These decisions recognize that counsel is appointed in order to provide indigent defendants with the professional expertise necessary to conduct their defense, at the same time emphasizing that "an assistant [counsel], however expert is still an assistant . . . an *aid* to a willing defendant."[155]

Imposition of this duty upon counsel would, in operation, be similar to the doctrine of informed consent in tort law.[156] Physicians, trained, skilled professionals, are required to convey to their patients their professional evaluation and advice regarding the patients' medical conditions. Patients thus gain both the benefit of physicians' professional expertise and protection from their own lack of medical education. The ultimate decision regarding treatment, however, belongs to the patient.[157] The doctrine of informed consent in tort protects the interests of patients in making their own decisions, while giving them access to the medical expertise and advice necessary to make their decisions informed ones. The role of appointed counsel, under the duty described, would function in the same manner.[158]

In proposing that the duty of appointed counsel to raise nonfrivolous issues requested by the client be recognized, the difficulties that could arise from its application—for example, enforcement—must not be overlooked. Common sense dictates, however, that this situation will not arise often;[159] thus, practical problems

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152. *See supra* text accompanying notes 103–08.

153. Douglas v. California, 372 U.S. 353, 355 (1963) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

154. *See supra* text accompanying notes 126–35.

155. Faretta v. California, 422 U.S. 806, 820 (1975) (emphasis added).

156. The doctrine of informed consent is referred to in this Article for purposes of analogy only. For a comprehensive discussion of this tort doctrine, see J. LUDLAM, INFORMED CONSENT (1978); Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).

157. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972):

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . . True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision an informed one.

Id. at 780 (footnotes omitted).

158. This is not to suggest that the doctrine of informed consent is constitutionally mandated, or that the recognition of the informed consent doctrine compels recognition of the duty of appointed counsel to raise on appeal nonfrivolous issues requested by the client. The analogy is offered only to demonstrate that imposition of this duty on appointed counsel is feasible.

159. *See supra* text accompanying note 120.

will be minimal. At the least, the difficulties are not likely to be greater than those presented by the implementation of any important, constitutionally mandated principle that is recognized by the Court. The lower federal courts would be put to the task by giving the doctrine practical content.

VII. CONCLUSION

By deciding the question raised in *Jones v. Barnes*—whether appointed counsel has a constitutional duty to raise on appeal nonfrivolous issues requested by the defendant—on the basis of recognized principles of effective appellate advocacy, the Supreme Court left unaddressed two issues of constitutional magnitude. These important issues are the equal protection and due process rights of indigent defendants prosecuting an appeal of a criminal conviction, and the role of appointed counsel contemplated by the sixth amendment.

The result in *Jones v. Barnes* is that counsel assigned to prosecute an appeal of a criminal conviction is under no constitutional duty to raise on appeal nonfrivolous issues requested by their clients. This result is inconsistent with prior Supreme Court pronouncements on the right of indigent defendants to equal access to the appellate process[160] (as set forth in *Griffin v. Illinois* and *Douglas v. California*) and on the role and function of appointed counsel under the sixth amendment[161] (as set forth in *Faretta v. California* and recently in *McKaskle v. Wiggins*).

Douglas v. California states unequivocally, paraphrasing *Griffin v. Illinois*, that "there can be no equal justice where the kind of appeal a man enjoys 'depends upon the amount of money he has.'"[162] *Faretta v. California* and *McKaskle v. Wiggins* both conclusively state that the role of appointed counsel is conceived, under the sixth amendment, as an aid, or assistant, to the defendant presenting the case. As Justice O'Connor stated in *McKaskle v. Wiggins*, "[t]he Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defence,' with *assistance* at what, after all, is his, not counsel's trial."[163]

The result in *Jones v. Barnes* is inconsistent with the language and spirit of prior Supreme Court decisions construing the guarantees of the sixth and fourteenth amendments. Surely the rights of an indigent defendant can only be fully effectuated through the Supreme Court's recognition of the defendant's ultimate authority to direct appointed appellate counsel to raise certain nonfrivolous issues on appeal according to the defendant's wishes.

160. *See supra* text accompanying notes 42–49, 103–08.
161. *See supra* text accompanying notes 126–36.
162. Douglas v. California, 372 U.S. 353, 355 (1963) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).
163. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).